INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	14

CITATIONS

Cases:

Alderman v. *United States*, No. 133, this term, decided March 10, 1969	9
Armstrong v. *United States*, 327 F. 2d 189	13
Chapman v. *California*, 386 U.S. 18	5
Clifton v. *United States*, 371 F. 2d 354, certiorari denied, 386 U.S. 995	8
Gleckman v. *United States*, 80 F. 2d 394, certiorari denied, 297 U.S. 709	13
Holland v. *United States*, 348 U.S. 121	12
Homan v. *United States*, 279 F. 2d 767	13
Mullins v. *United States*, 382 F. 2d 258	8
Murphy v. *Waterfront Commission*, 378 U.S. 52	6
Nardone v. *United States*, 308 U.S. 338	6, 7, 9
Pea v. *United States*, 397 F. 2d 627	8
Salerno v. *United States*, 61 F. 2d 419	13
Silverthorne Lumber Co. v. *United States*, 251 U.S. 385	7

336-764—69

Cases—Continued

	Page
United States v. *Coplon*, 185 F. 2d 629, certiorari denied, 342 U.S. 920	6
United States v. *Feinberg*, 140 F. 2d 592, certiorari denied, 322 U.S. 726	8
United States v. *Goldstein*, 120 F. 2d 485, affirmed, 316 U.S. 114	6
United States v. *Inman*, 352 F. 2d 954	8
United States v. *Mackey*, 345 F. 2d 499, certiorari denied, 382 U.S. 824	12
United States v. *Massei*, 355 U.S. 595	12
United States v. *Nardone*, 127 F. 2d 521, certiorari denied, 316 U.S. 698	7
United States v. *Wade*, 388 U.S. 218	5, 6, 8

Statute:

Internal Revenue Code of 1954, Sec. 7201 (26 U.S.C. 7201)	2

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1070

FRANK PETER BALISTRIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the trial court on a motion to suppress evidence (Pet. App. 18a–23a) is unreported. The opinion of the court of appeals (Pet. App. 1a–17a) is reported at 403 F. 2d 472.

JURISDICTION

The judgment of the court of appeals (Pet. 1a–17a) was entered on November 7, 1968, and a petition for rehearing was denied on December 31, 1968. By order of January 20, 1969, Mr. Justice Marshall extended the time for filing the petition for a writ of certiorari to February 19, 1969. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. (a) Whether the court of appeals used an improper standard in reaching the conclusion that the government evidence was free of taint.

(b) Whether the courts below were justified in finding that the lead to Midwest Scrap Iron Co. was justified.

2. Whether, by stating that petitioner was given the opportunity to show that a substantial portion of the case against him was the fruit of the poisonous tree, the court of appeals improperly cast upon him a part of the burden of establishing lack of taint.

3. Whether petitioner's rights were infringed by the illegal electronic surveillance of one of his attorneys which terminated fifteen months before the indictment was returned and which the courts below found not to have tainted the government's case in any way.

4. Whether the government's proof was sufficient to establish that petitioner's excessive net worth increases arose from current taxable sources.

5. Whether, in view of the court's corrective instruction, the prosecutor's error in asking one defense witness whether he had ever been arrested or convicted of a felony was prejudicial to petitioner.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201, provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by

this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Illinois petitioner was convicted of two counts of income tax evasion for the years 1959 and 1960, in violation of 26 U.S.C. 7201, and was sentenced to concurrent two-year prison terms and fines totalling $10,000.[1] The court of appeals affirmed.

The indictment alleged that the true taxable income and income tax of petitioner compared with the amounts he had reported on his returns was as follows (A. 43–45):[2]

Year	Taxable Income		Income Tax	
	Reported	Corrected	Reported	Corrected
1959	$5,355.00	$28,036.38	$1,098.10	$8,837.10
1960	5,220.00	36,868.90	1,068.40	12,860.52
Totals	10,575.00	64,905.28	2,166.50	21,397.62

It was established that during the year 1959 peti-

[1] The indictment had also charged petitioner and his bookkeeper, Jennie Alioto, with conspiring to obstruct the lawful functions of the Internal Revenue Service in violation of 18 U.S.C. 371. Because the court found that the conspiracy count was tainted by illegal evidence, it compelled the government to elect to proceed only on the two tax evasion counts. (Pet. 4.)

[2] As in the petition for a writ of certiorari, "A." refers to the Defendant's Appendix, "E." refers to "Excerpts of the Transcript Relating to Electronic Eavesdropping", and "G.A." refers to the Government's Appendix.

tioner's net worth[3] increased by $25,423.01 and that during the same year he made non-deductible expenditures of $10,169.42, resulting in an adjusted gross income as reconstructed of $35,592.43 (Govt. Ex. 465), and a taxable income of $30,992.43 (Govt. Ex. 466), compared with $5,355.00 reported on petitioner's tax return (Govt. Ex. 6). (See G.A. 194–195.) During the year 1960 petitioner's net worth increased by $28,519.76 and he made non-deductible expenditures of $12,875.02, resulting in an adjusted gross income as reconstructed of $41,394.78 (Govt. Ex. 465), and a taxable income of $36,794.78 (Govt. Ex. 467), compared with $5,220.00 reported on petitioner's tax return (Govt. Ex. 467). (See G.A. 191–193, 196–197.)

The sources of income reported on petitioner's tax returns for the two prosecution years were Hotel Roosevelt, Inc., Ben-Kay, Inc. and the Para Corporation. In addition, as to the year 1960, Melody Lane, Inc. was shown as a source of reported income.

The government's evidence showed that in addition to these reported sources of income petitioner in both 1959 and 1960 had, as an undisclosed source of taxable income, an enterprise known as the Midwest Scrap Metal Co. which bought scrap metal from the Altex Corp. (G.A. 36–37, 149) and s ld it to A. Cohen & Sons Co. (Govt. Exs. 468 and 469). The government's reconstruction of petitioner's profit on these operations was embodied in Govt. Exs. 468 and 469,

[3] The foundation for the net worth computations was a net worth statement of petitioner and his wife filed with the Wisconsin Department of Taxation in March, 1954, showing their net worth as of December 31, 1953 (Govt. Ex. 12A).

which disclosed that petitioner's profit for 1959 was $3,071.45 (G.A. 198) and his profit for 1960 was $2,163.05 (G.A. 201–202). Although petitioner did not conduct this business under his own name there was evidence that he was the sole owner.

Attempting to account for the unreported income shown on the government's net worth summaries, the defense called a number of witnesses who testified that they had loaned or advanced money to petitioner during the prosecution years.

ARGUMENT

1. Petitioner's first contention (Pet. 13–17) is that the court below used an improper standard in reaching its conclusion that the evidence used against petitioner was free of taint. Petitioner says the burden was on the government to establish lack of taint by clear and convincing evidence, *United States* v. *Wade*, 388 U.S. 218, 240, and that the court below found merely "substantial evidence" (Pet. 8a) to that effect. Petitioner did not, however, urge that standard in the court of appeals.[4]

[4] In its main brief the defense argued merely that the government had failed to sustain its burden of proving lack of taint and that the record affirmatively showed taint. No suggestion was made as to the standard of proof. In its petition for rehearing the defense argued, erroneously, that the government's burden was to prove lack of taint beyond a reasonable doubt, citing *Chapman* v. *California*, 386 U.S. 18, 24. That case holds merely that if a defendant's constitutional rights are infringed during the course of a trial it is up to the prosecution to prove beyond a reasonable doubt to the appellate court that the error was harmless. Here there was no infringement during trial.

We agree that the proper standard is "clear and convincing evidence" and we submit that that standard was met in this case. The government, having admitted possession of tainted information relevant to the case at issue,[5] had the burden of convincing the trial court that its proffered evidence had an independent origin. *United States* v. *Wade,* 388 U.S. 218, 240; *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 79, n. 18; *United States* v. *Coplon,* 185 F. 2d 629, 636 (C.A. 2), certiorari denied, 342 U.S. 920; *United States* v. *Goldstein,* 120 F. 2d 485, 488 (C.A. 2), affirmed, 316 U.S. 114. In discharging this burden the government:

(1) Affirmatively showed an independent source for the evidence used (G.A. 69–85, 98–103; E. 107–163; Govt. Motion Ex. 10).[6]

(2) Disclosed to the court and petitioner's counsel all information in the government's possession which was obtained as a result of the three electronic surveillances and the two searches and seizures (E. 9–25, 69–70, 75–77, 103, 188–191, 215–246; G.A. 45–59, 124–127, 251–254, 257–266).

(3) Actively assisted petitioner's counsel in ferret-

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[5] By disclosing these facts, in response to petitioner's motion, the government relieved the defense of any further burden under *Nardone* v. *United States,* 308 U.S. 338, 341, to establish that an illegal search occurred and that its fruits were used against him. Thus, the burden shifted to the government "to convince the trial court that its proof had an independent origin." *Ibid.*

[6] Govt. Motion Exhibit 10 shows the source of virtually all the government's evidence. Photostatic copies of that exhibit, together with Govt. Exs. 12A, 465 through 469, have been furnished to defense counsel and to the Clerk of this Court.

ing out possible taint by furnishing replies to all questions posed by counsel (E. 69–70, 75–76, 77, 81–91, 92–94, 103, 188–190; G.A. 45–51, 55–59, 60–62, 66–69, 86–97, 103–110, 124–125, 128–129, 248–260, 264–265, 273–275).

(4) Identified and made available for cross-examination all personnel and ex-personnel of the Federal Bureau of Investigation who participated in the three electronic surveillances (G.A. 97, 248–249).

The trial court ordered suppressed all information obtained as a result of the three electronic surveillances and the two searches and seizures and all leads developed therefrom (E. 182–187; G.A. 112–113). Additionally, the court compelled the government to elect to proceed to trial on the substantive counts, apparently recognizing that the conspiracy count might be tainted (E. 72; G.A. 266–269).

As for the source of the evidence concerning Midwest Scrap, the trial court held a hearing on this very matter and made specific findings of facts (E. 183–187) to the effect that a lead to Midwest Scrap was lawfully obtained by the Treasury agents prior to October, 1961, *i.e.,* prior to the searches and seizures and to the electronic surveillances, and that that lead was developed to its ultimate conclusion independently of, although subsequent to, the acquisition of the admittedly tainted leads. The suppression of evidence rule does not extend to facts which are obtained from a source completely free of taint merely because the same facts were obtained from another source concededly illegal. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392; *Nardone* v. *United States,*

308 U.S. 338, 341; *United States* v. *Nardone,* 127 F. 2d 521, 523 (C.A. 2), certiorari denied, 316 U.S. 698. The court of appeals found (Pet. 5a) that the trial court was right in holding that "the Midwest leads were obtained independently of the searches."

We submit that the government established by clear and convincing evidence that its trial evidence was untainted, and that the court of appeals would have had no hesitancy in so holding had petitioner called to its attention the correct formulation of the rule as to quantum of proof.

Moreover the confusion petitioner professes to find (Pet. 13–14) among the circuits does not exist. The correct rule is that where constitutional taint may have infected a trial the government has the burden of showing by clear and convincing evidence that the trial was not so infected. *United States* v. *Wade,* 388 U.S. 218, 240.[7] It is true that in two circuits, the District of Columbia and the Fourth, there is a special "reasonable doubt" rule for the guidance of trial courts, but that seems to have been limited to situations of confessions alleged to have been coerced. *Pea*

[7] Petitioner cites only one case (Pet. 13, n. 5) for the proposition that the District of Columbia Circuit has held that a preponderance of the evidence is sufficient, *Clifton* v. *United States*, 371 F. 2d 354, 358–359, certiorari denied, 386 U.S. 995, but that case has admittedly been overruled by the same court in a later case, *Pea* v. *United States*, 397 F. 2d 627 (*en banc*). Moreover *Clifton* v. *United States*, does not mention the word preponderance but merely says that "the confession should not be admitted in evidence unless the trial judge makes a preliminary determination and an express finding that on all the evidence he is satisfied that the confession was voluntarily made." (371 F. 2d at 359–360.)

v. *United States,* 397 F. 2d 627, 637–638 (C.A. D.C.); *Mullins* v. *United States,* 382 F. 2d 258 (C.A. 4); *United States* v. *Inman,* 352 F. 2d 954 (C.A. 4).[8]

2. The court of appeals did not cast upon the petitioner a part of the burden of establishing lack of taint when it stated that he was given "the opportunity to show that a substantial portion of the case against him was the fruit of the poisonous tree * * *" (Pet. App. 8a). As we have shown, *supra,* pp. 6–8, the government fully sustained its burden of establishing lack of taint. There is no validity in petitioner's theory (Pet. 17–19) that the source of the language just quoted, *Nardone* v. *United States,* 308 U.S. 338, 341, has been stripped of vitality by more recent authorities. Only recently, in *Alderman* v. *United States,* No. 133, this Term, decided March 10, 1969 (slip op., p. 17), this Court expressly reaffirmed the *Nardone* rule, stating that while the "ultimate burden" of proof is upon the government, "* * * * at the same time petitioners acknowledge that they must go forward with specific evidence demonstrating taint."

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[8] We disagree with petitioner's statement (Pet. 15) that the "chasm between substantial evidence and clear and convincing evidence is wide." In *United States* v. *Feinberg,* 140 F. 2d 592, 594 (C.A. 2), certiorari denied, 322 U.S. 726, Judge Learned Hand stated: "We agree with Judge Amidon in Hays v. United States, supra, 231 F. 106, who refused to distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt. While at times it may be practicable to deal with these as separate without unreal refinements, in the long run the line between them is too thin for day to day use." Of course the line between substantial evidence and clear and convincing evidence is even thinner.

3. The court below properly determined that petitioner's right to counsel was not so infringed by an electronic surveillance of one of his attorneys, Dominic Frinzi, that the indictment should be dismissed. This surveillance had terminated long before the indictment in the present case was returned and a full disclosure of the incident was made at the trial.

Disclosure of the surveillance of Frinzi, which had terminated on October 2, 1963 (E. 189, 234), was made to the trial judge on October 17, 1966, before the trial started, because petitioner's name had been mentioned in some of the intercepted conversations (E. 10). The records relating to the surveillance were not immediately made available to defense counsel, but were impounded and sealed by the trial judge (E. 21). Although Frinzi was one of the attorneys of record for petitioner, no one on the government's side appears to have been aware of that fact in the early days of the trial.[9] On November 3, 1966, one-third of the way through the trial, and in response to a question from the defense, the disclosure of the surveillance of Frinzi was made to the defense (E. 188–189; G.A. 95–97), and all the available materials relating to it were turned over to defense counsel (E. 194).

The purpose of the surveillance of Frinzi was not, as petitioner implies (Pet. 21), to interfere with his right to counsel. It was not directed against petitioner at all, but had been "placed on Frinzi because of his

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[9] Frinzi, who had never previously appeared at the trial or at the pre-trial suppression hearings, showed up in court on November 4, 1966, and was present through the remainder of the trial.

association with prominent Milwaukee hoodlums and in an effort to develop information bearing upon [a] gangland murder * * * " (G.A. 276; cf. G.A. 252–254). All information in the government's possession obtained as a result of this surveillance was turned over to petitioner and the names of the monitors were disclosed to him (G.A. 248–251, 276–278). Other than a very limited cross-examination of one FBI agent (E. 234–237, 240, 244), petitioner never availed himself of the opportunity to cross-examine these monitors. In view of this, we do not understand petitioner's statements (Pet. 22) that "[t]he documents necessary to show what was overheard are conspicuously absent", and "[t]he miscreant officers say they overheard no secrets."

The court below held that, "As with the other electronic eavesdropping, the Government proved its evidence was free from any taint as a result of this illegal surveillance" (Pet. App. 9a), and that it found "nothing in the record supporting the allegation that the purpose of conducting the surveillance was to interfere with defendant's right to counsel, nor does it appear that such right was infringed as the result of the Government's conduct" (*id.*).

Petitioner's argument (Pet. 21–23) that the proper remedy is dismissal of his case, if adopted, would mean that in every case where an attorney has been the subject of an electronic surveillance all of his clients would receive immunity from criminal prosecution, even where, as here, the surveillance terminated fifteen months before the indictment was returned. This is not the law. Petitioner was entitled

to an adversary proceeding as to the effect of the intrusion, and that is exactly what he has already received in the district court (Pet. App. 9a).

4. There is no merit in the argument (Pet. 23–26) that the government erred in pointing to Hotel Roosevelt, Inc. and Ben-Kay, Inc. as "likely sources" of unreported income. What this boils down to, of course, is a contention that the government did not establish that the unreported income arose from current taxable sources. *Holland* v. *United States,* 348 U.S. 121, 138.

To begin with, proof of a likely source is not indispensable; on the contrary, should all possible sources of non-taxable income be negatived, there is no necessity for proof of a likely source. *United States* v. *Massei,* 355 U.S. 595. Here, petitioner was given credit for all borrowings (Govt. Ex. 465). There was ample proof, from the lack of gift tax returns in the files of both the federal and state governments (G.A. 116–124), that the increases did not arise from gifts. There was no suggestion, either in the government's proof or that of petitioner that he had inherited any money. There was evidence that petitioner had received, in 1958, $2,087 as proceeds from a life insurance policy and he was duly given credit for that (Govt. Ex. 465). This left only taxable sources.

Moreover, the government established three likely sources of income: Midwest Scrap, which has been discussed (*supra,* pp. 4–5); and the two other enterprises of which petitioner was the president and active operator during the prosecution years (G.A. 148–149;

Tr. 1249). The jury could readily infer that most of the excessive net worth increases and expenditures arose from funds syphoned off from these businesses by petitioner. *United States* v. *Mackey,* 345 F. 2d 499, 506–507 (C.A. 7), certiorari denied, 382 U.S. 824; *Gleckman* v. *United States,* 80 F. 2d 394, 399 (C.A. 8), certiorari denied, 297 U.S. 709. Of course the government was not required to prove such syphoning off by direct evidence. If it could do that there would be no need to introduce the voluminous net worth proof. Cf. *Armstrong* v. *United States,* 327 F. 2d 189, 194 (C.A. 9).

5. The prosecutor's error in asking defense witness Klein whether he had ever been arrested or convicted of a felony (Pet. 12–13, 26–28) did not prejudice petitioner. Error which could not have affected the result of the trial is deemed not to be prejudicial and of no consequence, *Homan* v. *United States,* 279 F. 2d 767, 771–772 (C.A. 8), even where it occurs during the cross-examination of a defendant himself, *Salerno* v. *United States,* 61 F. 2d 419, 424 (C.A. 8). Klein's testimony, even if believed, could have had no possible effect on the 1959 count and only a minor effect on the 1960 count—reducing the unreported taxable income from $31,574.78 to $26,574.78. Since it is, of course, unnecessary for the government to prove the exact amount of unreported income alleged in the indictment, the relatively minor impact of Klein's testimony should not result in a reversal with respect to either count. Moreover, the defense was perfectly free to call to the jury's attention the fact

that Klein had a clean record but chose not to do so. The prosecutor's error was only a minor lapse in a long trial, which the court promptly instructed the jury to disregard, and which could not have affected the verdict.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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